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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 784

FRANCIS RAY ROBINSON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

REPLY OF PETITIONER TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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In its effort to persuade this Court to deny the petition filed herein and thereby sustain the conviction of petitioner for selling narcotics,[1] the Brief of the United States in Opposition finds it acceptable justice that an instruction on entrapment which has been specifically rejected by the Second Circuit as "invit[ing] needless confusion" serves—and will continue to serve—as the guide for juries in other circuits, makes no

[1] Petitioner was sentenced to a term of fifteen years.

effort to defend a prejudicially erroneous instruction, but argues that it was cured by other portions of the charge and that, "in any event," the point was not "specified" to the trial court, and incompletely summarizes the evidence relevant to the issue of petitioner's "predisposition" to deal in narcotics. In view of the foregoing, it is necessary to submit this reply to the Government's brief.

I

We submit that this petition should be granted because there is a conflict between Courts of Appeals concerning a matter of great importance in the trial of offenses that are being prosecuted with growing frequency. The need for clarity of instruction with respect to entrapment cannot be overemphasized in view of the efforts being made today to enforce the narcotics laws.

In *Pugliese* v. *United States*, 346 F. 2d 861 (C.A. 2, 1965), the Court of Appeals for the Second Circuit rejected the same instruction on entrapment as was given in the instant case because it "invite[s] needless confusion."[2] The continued use of this instruction in other circuits is certain because it has been approved by other Courts of Appeals[3] and because it is found in two manuals that enjoy wide acceptance by trial judges.[4] These facts are acknowledged in the brief in

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[2] Pet. 14-15.

[3] *United States* v. *Laverick*, 348 F.2d 708 (C.A. 3, 1965); *Cross* v. *United States*, 347 F.2d 327 (C.A. 8, 1965), wherein the Court explained at length why the use of "lawful entrapment" and "unlawful entrapment" was not confusing.

[4] Pet. 16-17.

opposition. Nevertheless, instead of joining to request that this conflict between Courts of Appeals be resolved, the Government asks that the petition be denied. It does so because it is of the opinion that such instruction was "adequate" (G. Br. 10).

We respectfully submit that, when a Court of Appeals has expressed its opinion that such instruction "invite[s] needless confusion" and when it is clear that such instruction will continue to be used by trial judges in at least those circuits in which it has been approved, uniformity of instruction on this critical phase of defense among the several circuits requires that this Court resolve the conflict.

II

The Government does not appear to challenge petitioner's complaint that the instruction on entrapment *required* the jury to reject petitioner's defense of entrapment to the *narcotics* charges if it found that petitioner had a predisposition to sell *non-narcotic* pills. Nor does the Government seem to defend such instruction as being a proper one. It argues, instead, that such complaint is without "substance" because a "full reading of the charge, and particularly of the instruction to consider each count separately, demonstrates that the jury could not have been confused in this manner" (G. Br. 10). In short, the Government argues that the error complained of was cured.

The specific instruction relied upon to cure the error complained of reads:

> "You are advised that a separate crime or offense is charged in each of the counts contained in the indictment herein. Each crime or offense as

> charged and the evidence applicable thereto should be considered separately. The fact that you may find the defendant guilty or not guilty of one of the crimes or offenses charged should not control your verdict with reference to any of the other crimes or offenses charged." (R. 303)

Such charge did not and could not cure the error complained of. Granted that the jury was instructed to consider each crime separately and that its finding with respect to one crime should not control its findings as to the others, the critical fact remains that, in its *separate* consideration of each crime, the jury was following an instruction which advised it that the defense of entrapment could not prevail as to the particular crime it was then considering if it found that the petitioner was "ready and willing to commit crimes, such as charged in the indictment, * * *."[5] Thus, in its separate consideration of each of the narcotics charges, the jury was proceeding under the clear admonition that petitioner was not entitled to the defense of entrapment if it found that petitioner was "ready and willing" to sell pills.[6] The instruction that each crime be considered separately could not cure the instruction complained of.[7]

As for the Government's position that the complaint here pursued was not brought to the trial court's at-

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[5] This advice was also stated in the following manner: "* * * if the jury should find * * * that the accused had no previous intent to commit *any* offense of the character *here charged* * * *" the jury should acquit the petitioner (R. 302, emphasis supplied).

[6] Such instruction is, we submitted, in conflict with *Hansford* v. *United States*, 303 F.2d 219, 112 U.S. App. D.C. 359 (1962). (Pet. 17-21)

[7] It is to be noted, also, that the jury asked for, and received, a written copy of the instruction on entrapment (R. 310-311).

tention, it is to be noted that the instruction which was requested but denied specifically provided that the defense of entrapment was being raised only to the narcotics charges and, accordingly, directed the jury's attention to the petitioner's and the Government agents' actions with respect thereto (App., p. 11a). Moreover, petitioner had objected to the admission of the evidence relating to the sales of pills in Texas for the purpose of showing intent and to show a course of conduct on the ground that a sale of pills is in no way connected with a sale of narcotics and that "this testimony would prejudice him with respect to Counts Five, Six and Seven (narcotics)" (R. 22-24). Petitioner also objected to the Court's instruction concerning the purpose of such evidence (R. 307).

III

The Government's summarization of the evidence relating to petitioner's defense of entrapment is so capsuled that it glosses over facts of critical importance, thereby resulting in the assertion of two material conclusions, each of which is contrary to the facts.

The Government states that the inspector's initial inquiry of petitioner concerning petitioner's ability to obtain narcotics came about because petitioner "boasted" he could get "anything" (G. Br. 9), thus implying that petitioner was the one who first suggested the possibility of obtaining narcotics for the inspectors. The fact is that the inspector and petitioner were then talking about petitioner's ability to obtain "amphetamine powder, the raw stuff" (from which pills are made), so the inspector and petitioner could "'go in business and punch out our own pills'" (R. 160). The

context makes it perfectly clear petitioner was not referring to narcotics when he said he could get "anything."

The Government twice uses the word, "immediately," in its effort to make it appear that petitioner did not hesitate to avail himself of the "opportunity" afforded him by the inspectors to obtain narcotics for them (G. Br. 9). "Immediately" is the antithesis of the fact: It was only after *five weeks* of importuning by the inspectors—four long distance telephone calls and a personal visit—that petitioner produced any narcotics (Pet. 5-7).[8]

The detailed recitation of the facts set forth in the petition[9] establishes that it was the agents of the Government who first suggested that petitioner obtain narcotics for them and who, thereafter, by entreaty and appeal, induced and persuaded petitioner to obtain narcotics for them.

CONCLUSION

For the reasons stated in the petition and in this reply, we respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[8] Petitioner then acted only as the middleman between the agent and the person to whom the narcotics belonged (Pet. 7).

[9] Pet. 2-11. Such a recitation was required because of the very nature of the defense of entrapment.